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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

MICHELE SINDONA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Question Presented.

Whether the attorney-client privilege must give way to the right to cross-examination guaranteed by the Sixth Amendment to the United States Constitution, where the key government witness against a defendant — a former co-defendant cooperating with the government — seeks to use the privilege as a bar to the defendant's efforts to impeach his central testimony and demonstrate his bias and motive through use of a document written by the witness to his former attorney and voluntarily provided by that attorney to defense counsel?

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No. - .

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MICHELE SINDONA,
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UNITED STATES OF AMERICA,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Michele Sindona petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 18, 1980.

Opinions Below.

Following a nine-week jury trial in the United States District Court for the Southern District of New York (Griesa, J.), petitioner Michele Sindona was convicted of conspiracy to defraud and substantive charges of mail, wire, and stock fraud, misapplication of bank funds, false entries and statements, and perjury stemming from the collapse of the Franklin National Bank. He was sentenced to a 25-year term of imprisonment and fined sums totalling $207,000.00 (A. 3a).

Petitioner appealed from the judgment of the District Court entered on June 13, 1980. His conviction was affirmed by the United States Court of Appeals for the Second Circuit on December 18, 1980. The court's opinion, not yet officially reported, is reproduced in the Appendix at A. 1a-28a.

The United States District Court for the Southern District of New York suppressed a document, which petitioner sought to use to impeach the government's key witness against him, upon the witness' assertion that its use would violate his attorney-client privilege. The court's oral ruling on the witness' claim is reproduced in the Appendix at A. 29a-32a.

Jurisdiction.

The judgment of the Court of Appeals was entered on December 18, 1980. The time for filing a petition for a writ of certiorari was enlarged to March 18, 1981 by Mr. Justice Marshall. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provision Involved.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ..

Statement of the Case.

On March 19, 1979, a 99-count indictment stemming from the 1974 collapse of the Franklin National Bank was returned in the United States District Court for the Southern District of New York against petitioner Michele Sindona and Carlo Bordoni, a former associate of petitioner. Count One charged a conspiracy to defraud the United States, various government departments and agencies, and various corporations. The remaining counts contained substantive charges of wire fraud, mail fraud, stock fraud, misapplication of bank funds, false entries, false statements, and perjury (A. 2a-3a).

Bordoni had previously pled guilty to various charges in an earlier indictment filed against him and other officers of the Franklin National Bank, pursuant to an agreement requiring his full and truthful disclosure of information to and cooperation with the government, including his testimony at grand jury and court proceedings. On June 26, 1979, he entered a plea of guilty to the conspiracy charge under the same terms set forth in his prior plea agreement — terms which required his testimony at the trial on a 69-count superseding indictment

filed against petitioner alone which began on January 20, 1980 (A. 2a).*

Although the trial was lengthy and involved the presentation of a number of witnesses and the introduction of numerous documents, Carlo Bordoni was the government's key witness; it was his testimony that constituted the heart of the government's case. As characterized by the Court of Appeals, he was the government's "star witness," whose testimony was "central to the prosecution of this case" (A. 20a, 2a fn.). Indeed, the government conceded that "there [was] substantial doubt the case could have been brought by the United States without Mr. Bordoni's testimony" (A. 44a).

Petitioner sought to impeach Bordoni's direct testimony and to demonstrate his bias and motive by using, on cross-examination, a hand-written document Bordoni had provided to his former attorneys in Venezuela, including one Carlos Martinez.** This document and other materials, given to defense counsel by Martinez prior to trial, had been inadvertently disclosed to the Assistant United States Attorney, who informed the attorney then representing Bordoni of their possession by petitioner. Through counsel, Bordoni asserted the attorney-client privilege as to these materials prior to trial. The claim

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* Although not named as a defendant in the superseding indictment of January 11, 1980, Bordoni was prominently featured in all but the false entries, false statements and perjury counts. Indeed, the charges in the original and superseding indictments were essentially the same, although a number of substantive charges from the March indictment were either dropped from or reduced in the January indictment. A fuller description of the charges and evidence at trial is set forth in the opinion of the court below, reproduced in the Appendix at A. 1a-28a, *infra*. It will not be repeated herein since those facts are unnecessary to the resolution of the question presented in this petition.

** Bordoni had gone to Venezuela to avoid criminal charges in Italy and the United States and unsuccessfully fought the extradition proceedings initiated by the United States.

was upheld as to the hand-written document after a hearing at trial;* the document was suppressed and ordered returned to Bordoni; and defense counsel was precluded from using it on cross-examination (A. 29a-32a).

According to counsel's offer of proof**, the document would have added significantly to Bordoni's cross-examination, showing:

(1) that, contrary to his more benevolent assertions at trial, Bordoni considered himself petitioner's bitter enemy;
(2) Bordoni's arguably paranoid obsession and hostilities, including a belief that the American Embassy in Caracas, Venezuela was running a press campaign against him;
(3) his related belief that petitioner was in league with the C.I.A. for nefarious purposes;
(4) further grounds of hostility against petitioner stemming from Bordoni's conviction that petitioner was allied "with the privileged and exploiting interests in America";
(5) Bordoni's shifting targets and accusations, dating back to his assertions that his extradition from Venezuela had been sought through "fictitious and lawless actions of Assistant United States Attorney John Kenney," chief prosecutor in petitioner's case; and

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* At the hearing, Bordoni testified that Carlos Martinez had been one of his attorneys in Venezuela, and that the document had been provided to his attorneys at their request with the expectation that it would not be disclosed. He also testified that he had subsequently brought criminal accusations against Martinez (A. 33a-34a, 37a, 39a-40a).

** The offer of proof was submitted to the trial court in writing and ordered sealed. Its description in this petition is taken from the brief filed by petitioner in the court below, and was not challenged as factually inaccurate by the government in its brief on appeal.

(6) other prior statements inconsistent with Bordoni's testimony or the testimony of others at petitioner's trial.

After seven days of deliberations, the jury returned verdicts of guilty on 65 of the 66 counts submitted for its consideration.

Reasons Why the Writ Should be Granted.

Petitioner submits that the courts below struck an unconstitutional balance in permitting the crucial witness testifying against him — a former co-defendant cooperating with the government, who was characterized by the Court of Appeals as the government's "star witness," and one whose "testimony was central to the prosecution of this case" (A. 20a, 2a fn.) — to assert the attorney-client privilege as a bar to petitioner's efforts to impeach that central testimony and demonstrate bias and motive through use of a document written by the witness to his former attorneys and released by one of them to petitioner's counsel. The criteria and standards to be employed in resolving the conflict between a defendant's Sixth Amendment right to confront and cross-examine witnesses against him and a witness' invocation of the attorney-client privilege to restrict cross-examination is an important issue which should be addressed by this Court to ensure that the criminal justice system provides a defendant with the fair trial to which he is constitutionally entitled.

The right to effectively cross-examine a witness — not only to test perceptions and memory, but also, critically, to impeach his credibility, and to demonstrate bias, prejudice, and motive to testify — is an integral component of a defendant's

right "to be confronted with the witnesses against him," as guaranteed by the Sixth Amendment to the United States Constitution. Indeed, as this Court stated in *Davis* v. *Alaska*, 415 U.S. 308, 315-316 (1974), "'[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*'" (Emphasis in original.) Its role in the provision of a fair trial has been long recognized by this Court. See, *e.g.*, *Alford* v. *United States*, 282 U.S. 687 (1931); *Smith* v. *Illinois*, 390 U.S. 129 (1968); *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Bruton* v. *United States*, 391 U.S. 123 (1968); *Davis* v. *Alaska*, *supra*.

Where, as here, the testimony and the credibility of one witness constitutes the heart of the government's case,* an opportunity for complete and searching cross-examination "directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand" (*Davis* v. *Alaska*, *supra*, 415 U.S. at 316) is necessary to provide the jury with a full factual predicate for its crucial assessment of that witness' credibility.** Thus, in *Davis* v. *Alaska*, *supra*, this Court held that restrictions on cross-examination precluding a defendant from presenting the jury with *specific facts* relevant to a demonstration of bias and motive denied the defendant his constitutional right of effective cross-examination, even though he had been

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*As government counsel stated at Bordoni's sentencing, "in the Sindona case, there is substantial doubt the case could have been brought by the United States without Mr. Bordoni's testimony" (A. 44a).

**"The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis* v. *Alaska*, *supra*, 415 U.S. at 316-317.

permitted general inquiry into bias; see also, *Smith* v. *Illinois*, *supra*.*

As this Court has also held, otherwise legitimate interests must sometimes yield to effectuate the paramount constitutional guarantee of the Sixth Amendment. See, *e.g.*, *Davis* v. *Alaska*, *supra* (Sixth Amendment right to cross-examine as to bias outweighs the state's otherwise legitimate interest in protecting the anonymity of a juvenile offender); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973) (state evidentiary rule precluding cross-examination of own witness must give way to Sixth Amendment right).

Making that determination requires analyzing the nature and assessing the relative weights of the competing interests in the context of both judicially recognized principles and policies and the facts and circumstances of the particular case. In this case, petitioner submits that examination of the decisions below demonstrates that the courts either failed to undertake the requisite analysis, or misconceived the nature and import of the policies and principles relevant to resolution of the conflict between petitioner's Sixth Amendment right and the witness' attorney-client privilege.** In either event, since proper

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* This Court has also recognized the importance of the right to present evidence to the jury relevant to an assessment of a witness' credibility in the context of discussing the prosecution's obligation to disclose such evidence to a defendant. See, *e.g.*, *Giglio* v. *United States*, 405 U.S. 150 (1972).

** The ruling of the trial court focused exclusively on whether Bordoni had established his claim that the document had been protected by, and had been disclosed without waiver of, the attorney-client privilege. It did not examine whether the policy interests of the privilege were served by its recognition in this case. Nor did it address the nature or weight of petitioner's constitutional right to cross-examination, either generally or under the facts and circumstances of the case before it. Finally it made no attempt to balance the competing interests (A. 23a-24a).

The Court of Appeals also focused primarily on the attorney-client privilege, again without examining whether the interests it protects were advanced by its invocation in this case. Nor does its conclusory assessment of

analysis and balancing of the competing interests involved here requires that the attorney-client privilege yield to the Sixth Amendment right of cross-examination (see *infra*), certiorari should be granted and the decision below should be reversed.

While the attorney-client privilege constitutes a long-standing and important policy designed to promote the administration of justice by fostering the complete and candid disclosure from client to attorney necessary for effective legal representation, it, like other privileges, is not sacrosanct. As this Court explained in a general discussion of privilege in *Clark* v. *United States*, 289 U.S. 1, 13 (1933):

> But the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of the court to mediate between them, assigning so far as possible, a proper value to each and summoning to its aid all the distinctions and analogies that are tools of the judicial process.

Moreover, like other privileges, the attorney-client privilege is an "exception to the demand for every man's evidence [which is] not lightly created nor expansively construed for it is in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974).

Balancing the privilege against the specific constitutional guarantee of the Sixth Amendment, petitioner submits that the privilege is clearly outweighed. The crucial role of cross-

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the impact of the excluded evidence on petitioner's cross-examination of the witness accord with this Court's analysis of the elements of effective cross-examination in *Davis* v. *Alaska*, *supra*.

examination in providing the factual foundation for the jury's assessment of a witness' credibility — a judgment that may well determine the outcome of a trial — has been set forth above at pp. 6-8. Its paramount importance — and the error in excluding use of evidence for that purpose even if obtained in violation of the attorney-client privilege — is further exemplified by this Court's holdings that the government may use evidence obtained in violation of *constitutional* rights in cross-examining a witness, even though that evidence is inadmissible in its case-in-chief. In *Walder* v. *United States*, 347 U.S. 62 (1954), this Court approved the admission of illegally seized evidence to impeach a defendant's direct testimony. Just last term, this Court held that illegally obtained evidence may be used to impeach a witness' false testimony on cross-examination, even where the evidence does not squarely contradict his testimony on direct examination. *United States* v. *Havens*, ___ U.S. ___, 100 S.Ct. 1912 (1980). Statements obtained in violation of *Miranda* v. *United States*, 384 U.S. 436 (1966), although excluded from the prosecution's case-in-chief, were held admissible to impeach the defendant in *Harris* v. *New York*, 401 U.S. 222 (1971) and in *Oregon* v. *Hass*, 420 U.S. 714 (1975).

Accordingly, petitioner submits that the constitutional right to effective cross-examination enjoys a higher level in the hierarchy of values than the attorney-client privilege; and that the unwarranted elevation of the privilege above that constitutional right was "constitutional error of the first magnitude" (*Davis* v. *Alaska*, *supra* at 318) requiring remedial action by this Court.

Examining the competing interests in the context of the facts of this case tips the balance against the privilege even further. The actual interest of the witness protected by the privilege under the facts and circumstances here was limited at best. The confidentiality of Bordoni's communications to his former

lawyers had already been breached by their provision to petitioner's counsel. Any relationship of trust and confidence between client and counsel had long since been destroyed by Bordoni's accusations of criminal conduct on that attorney's part. Since Bordoni had agreed to waive his Fifth Amendment privilege against self-incrimination and to cooperate fully with the government as part of his plea agreements, the usual high interest in maintaining the confidentiality of a client's incriminatory communications to his attorney was notably absent. What remained was Bordoni's interest in avoiding impeachment of his testimony and credibility. Thus, even though the attorney-client privilege may have remained technically available to Bordoni, the benefits he would derive from its assertion here were, petitioner submits, minimal.

On the other hand, petitioner's interest in the effective cross-examination guaranteed by the Sixth Amendment was compelling. Bordoni was the key to the government's case; the jury's determination of his credibility may well have been outcome-determinative. And what better evidence of bias, hostility and motive could petitioner present than documentation in the witness' own handwriting made under circumstances indicative of their truth?

The error in assessing the nature and relative weight of the competing interests involved here was compounded by the remedy employed to effectuate the court's choice. Petitioner contends that even assuming, *arguendo* (but see discussion *supra*), the propriety of some sanction, suppression of the document should not have been ordered unless coupled with the striking of Bordoni's direct testimony.

As this Court has acknowledged, "the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case," and its "unbending application . . . would impede unacceptably the truth-finding functions of the judge and jury." *United States*

v. *Payner*, ___ U.S. ___, 100 S.Ct. 2439, 2445-2446 (1980). By depriving the jury of the prior writings of the witness himself — perhaps the most relevant probative evidence with a direct bearing on the assessment of the credibility of the direct testimony of the government's key witness against petitioner — application of the exclusionary rule (without any correlative efforts to ameliorate the effect of that sanction on petitioner's Sixth Amendment right to effective cross-examination) is simply too high a price to pay for the minimal benefit derived from upholding the privilege.

Moreover, and critically, the exclusionary rule is a prophylactic measure designed "to deter future unlawful *police* conduct," *United States* v. *Calandra*, 414 U.S. 338, 347 (1974) (emphasis added); "to enforce ideals of *governmental* rectitude . . ." (*United States* v. *Payner*, *supra*, 100 S.Ct. at 2445 (emphasis added). It is inapplicable to evidence obtained by private parties. *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921) (government entitled to use incriminatory documents illegally and wrongfully taken from putative defendant by private party and turned over to government officials). If the government is not precluded from reaping the benefits of evidence unconstitutionally seized by private parties, *a fortiori*, a defendant should not be precluded from using evidence released by a private party in violation of the attorney-client privilege.

Addressing the question of the relationship between the exclusionary rule and the attorney-client privilege in the context of a corporation's motion to quash a subpoena, which it contended resulted from a privileged report prepared by outside counsel and brought to the attention of the SEC only as a result of its unauthorized disclosure to a different government agency by a third party, the court in *Securities and Exchange Commission* v. *OKC Corp.*, 474 F.Supp. 1031 (N.D. Tex. 1979), *appeal dismissed without published opinion*, 631 F.2d 730 (5th Cir. 1980), stated:

> Implicit in OKC's argument is the contention that, like the rules suppressing evidence seized in violation of the Fourth Amendment, a prophylactic exclusionary rule is a necessary buttress to the attorney-client privilege; that this subpoena should be quashed as a fruit of the poisonous tree. The aim of the Fourth Amendment's exclusionary rule, however, is protection of privacy by denying to government agents who would invade protected privacy the fruit of their conduct. In a case in which a government agency innocently learns of privileged information from a person who rightfully possesses that information, there is no conduct to deter unless it is the delivery of that information by a person, who, although rightfully in possession of it, was not authorized to disclose it. Even then, the only deterrent value would be to reduce the incentive for such disclosure by barring the government's use of the information disclosed. 474 F.Supp. at 1040.

Similarly, here, there is little if any deterrent value in the application of an exclusionary rule; petitioner invaded no protected interest in accepting the document voluntarily provided by the witness' former attorney.

Accordingly, petitioner submits that the rationale behind the exclusionary rule does not justify its use as a tool for enforcing the attorney-client privilege where, as here, such use denies a defendant his Sixth Amendment right to cross-examination.*

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*Had the trial court both suppressed the evidence it deemed privileged and stricken the direct testimony of the witness, petitioner's constitutional rights would have been protected and the government could have either proceeded without its key witness, or made efforts to persuade him (for he was a cooperating witness) to waive his privilege.

Conclusion.

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 247 — September Term, 1980.
Argued September 29, 1980 — Decided December 18, 1980.
Docket No. 80-1270

UNITED STATES OF AMERICA,

Appellee,

—against—

MICHELE SINDONA,

Defendant-Appellant.

Filed: July 18, 1980

Before Mulligan and Timbers, Circuit Judges and Nickerson,* District Judge.

Appeal from a judgment of conviction entered on June 13, 1980, by Judge Thomas P. Griesa in the District Court for the Southern District of New York convicting appellant of conspiracy and substantive charges of fraud and misapplication of bank funds stemming from the collapse of the Franklin National Bank.

Affirmed.

John J. Kenney, Assistant United States Attorney, John S. Martin, Jr., United States Attorney for the Southern District, Charles M. Carberry, Richard F. Ziegler, Gregory L. Diskant, (Assistant United States Attorneys, of counsel), for the Appellee.

Marvin E. Frankel, New York, N.Y. (Proskauer, Rose, Goetz & Mendelsohn, New York, N.Y., Stephen E. Tisman, of counsel, for Defendant-Appellant.

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* United States District Judge of the Eastern District of New York, sitting by designation.

MULLIGAN, Circuit Judge:

Michele Sindona appeals from a conviction by a jury which found him guilty on 65 counts of a 69 count indictment. The conviction followed a nine week trial in the United States District Court for the Southern District of New York (Thomas P. Griesa, Judge). We affirm the conviction on all counts.

The appellant, an Italian financier, was alleged to have controlled an international group of banks and corporations in the early 1970s. Partially as a result of conduct underlying this prosecution, the Franklin National Bank (Franklin), in which Sindona owned 21.6% of the outstanding stock and was a director, was declared insolvent on October 8, 1974. On January 11, 1980, a superseding indictment consisting of sixty nine counts[1] was filed against Sindona. The first count charged the appellant, Sindona, and Carlo Bordoni[2] with conspiracy to defraud the United States and various departments and agencies thereof in violation of 18 U.S.C. §§ 656, 1001, 1005, 1014, 1341, 1343; 15 U.S.C. §§ 78j(b) and 78ff; and Rule 10(b)(5) (17 C.F.R. 240.10-b-5). The remaining substantive counts charged Sindona with a scheme to defraud

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[1] An original 99 count indictment naming Michele Sindona and Carlo Bordoni as defendants was filed on March 19, 1979. The charges in the original and superseding indictment were essentially the same with some variation. Counts 2-13 of the earlier indictment were dismissed on motion by the Government See *infra*. Counts 61-75, 76, 79 and 83 of the earlier indictment were not included in the superseding indictment and counts 77, 78, 80, 81 and 82 of the original indictment were reduced and appear as counts 49, 50, 51, 52 and 53 of the latter indictment.

[2] Bordoni has previously pleaded guilty to various charges in an indictment filed against him and other officers and a director of Franklin, 75 Cr. 948, as well as the conspiracy count in the original indictment filed in this prosecution. He was the managing director of Banca Unione in Milan. Bordoni's testimony was central to the prosecution of this case as well as in the trial of *United States* v. *Gleason*, No. 78 Cr. 522 (S.D.N.Y. March 29, 1979). After testifying in these actions Bordoni was sentenced to 7 years imprisonment and a fine of $20,000.

Franklin and the United States by: misapplying $15 million of bank funds in October 1972 in violation of 18 U.S.C. § 1343 (Counts 2-7) and 18 U.S.C. § 656 (Count 8); making secret payments or bribes to a senior officer of Franklin, Peter R. Shaddick, thereby inducing Shaddick to enter false information in Franklin's books in violation of 18 U.S.C. § 1343 (Counts 9-11); and causing Franklin to enter into fictitious foreign exchange transactions in order to portray a profit in violation of 18 U.S.C. §§ 1341 and 1343 (Counts 12-48). Sindona was further charged with causing false entries to be made in Franklin's books, reports and statements in violation of 18 U.S.C. § 1005 and 12 U.S.C. §§ 1841(a)(1) and 1847 (Counts 49-51); causing falsified statements of Franklin to be submitted to the Manufacturers Hanover Trust Company in order to obtain a loan and extension of credit in the amount of $35 million to Franklin in violation of 18 U.S.C. § 1014 (Counts 51-53); perjury before the Securities and Exchange Commission in violation of 18 U.S.C. § 1621 (Count 54); and use of the United States mails to engage in a manipulative scheme with respect to the purchase and sale of Franklin stock in violation of 15 U.S.C. §§ 78j(b) and 78ff as well as Rule 10(b)(5) (17 C.F.R. 240.10-b-5) (Counts 55-69). Counts 56, 63 and 68 were dismissed by the court with the remaining counts renumbered 1 through 66. The jury, after six days of deliberations, found Sindona guilty on all but count 9, one of the wire fraud counts. Judge Griesa sentenced Sindona to twenty five years and a fine of $207,000.[3]

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[3]The sentence was computed by dividing the counts into four groups and imposing consecutive sentences within each group. The sentences for each group would then run concurrently with the sentences for the other groups while the fines remained cumulative. The sentences and fines were:

Counts 1, 10, 11, 55-66	25 Years, $132,000
Counts 2-8	25 years, $11,000
Counts 12-48	25 years, $37,000
Counts 49-54	24 years, $27,000

The financial machinations of Sindona were indeed massive, complicated and unscrupulous, wreaking financial disaster upon banking and financial institutions as well as economic and personal tragedy upon the persons involved including, of course, the principal architect of the scheme, Sindona himself. Sindona does not attack his conviction on all counts on his appeal but focuses upon six specific alleged errors. We see no point in setting forth in detail all the manipulations employed but will address the facts so far as they are applicable to the errors claimed.

I. *Paragraph 35*

Viewing the evidence as we must in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60 (1942), there clearly was sufficient evidence for the jury to have found that in mid-1972, Sindona acquired 21.6% of the outstanding shares of Franklin at a price of $40 million. The money was obtained from Italian banks through the use of a fiduciary deposit system. Under this system, Banca Privata Finanziaria (BPF) and Banca Unione (BU)[4] placed the money on time deposits at the Privat Kredit Bank and Amincor Bank in Zurich, Switzerland and recorded these placements on their books. The Swiss banks, however, transferred the funds to a Sindona owned corporation, Fasco International, by means of a secret "fiduciary contract" whereby the Swiss banks would not be liable for repayment to the Italian banks unless and until the Sindona corporation repaid the Swiss banks. These arrangements were concealed from the Italian authorities and

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[4] Sindona effectively controlled both banks through direct and indirect stock ownership. In addition, he was a director and member of the executive committee of each bank.

were not reflected in the banks' records. On July 24, 1972, Sindona falsely represented, in a statement filed with the Securities and Exchange Commission, that the funds used to acquire Franklin were his personally. Although this statement was later amended to indicate that the funds belonged to Fasco International, no mention was made of the fiduciary contract. Moreover, in 1974 Sindona once again stated during an SEC investigation into the collapse of Franklin that the funds were his personally and that there was no debt connected with them. In April, 1973, Sindona and Bordoni employed a similar scheme whereby Sindona received slightly over $27 million with which he acquired Talcott, a large American financial corporation. It was Sindona's intention to bring about the merger of Franklin and Talcott in order to improve Franklin's earnings as well as securing greater credit for Franklin in the international banking network. Once again, Sindona reported to the SEC that the funds used to acquire Talcott were his personally.

This conduct formed the basis of paragraph 35 of the indictment which was alleged to have been the first object of the conspiracy. In addition, the original indictment filed against Sindona on March 19, 1979 included twelve substantive counts based upon these transactions. These substantive counts were later dropped from the indictment on a motion by the Government.

Paragraph 35 states that:

> [i]t was a part of said conspiracy that Sindona and Bordoni, among others, would fail to disclose and would actively conceal from the interested United States authorities and other persons, that the money used to purchase Sindona's interest in the Franklin N.Y. Corp. and Talcott was fraudulently and illegally removed from the general deposits of BU and BPF, banks which Sindona controlled in Italy.

Sindona's only defense to this or any charge in the indictment was documentary evidence which showed that Sindona had repaid the $67 million involved and, therefore, these transactions were legitimate loans with no fraud or illegality involved. The court below, however, instructed the jury that it could convict Sindona of conspiracy based upon paragraph 35 as long as they found that Sindona concealed from the regulatory authorities material facts of whatever nature relating to the source of the funds and that they need not find that the funds were fraudulently and illegally removed from Italian banks. This charge to the jury is alleged to be an impermissible variance from the charge in the indictment and constitutes appellant's first claim of error on appeal. In addition, Sindona claims that the Government failed to show a separate agreement to conceal these alleged Italian loans, or "crimes", and thus, the conspiracy conviction should be reversed pursuant to *Grunewald* v. *United States*, 353 U.S. 391 (1957); *Lutwak* v. *United States*, 344 U.S. 604 (1953).

Paragraph 35 of the indictment in sum, charged that one of ten objects in the conspiracy between Sindona and Carlo Bordoni was to "fail to disclose and . . . actively conceal from the interested United States authorities . . ., that the money used to purchase Sindona's interest in the Franklin N.Y. Corp. and Talcott was *fraudulently and illegally removed from the general deposits of BP and BPF, banks which Sindona controlled in Italy*." (Emphasis added.) Sindona contends that throughout the pretrial discovery period, and even during the presentation of its case in chief, the position of the Government was that Sindona had been charged with concealment of the Italian crimes of embezzlement and fraud. Thus, he argues that if the Government failed to prove that the method utilized to obtain the acquisition funds was illegal then there could not be a conviction for conspiracy based upon the object in paragraph 35. Sindona urges that the Government sudden-

ly changed positions by arguing to the judge below that he could be convicted based upon paragraph 35 as long as the jury found that he had *concealed* material information of *whatever nature*. Thus, if the jury found that Sindona concealed the source of the funds used to acquire the Franklin and Talcott shares from the SEC, it would be able to convict Sindona of conspiracy to defraud the United States in violation of 18 U.S.C. §§ 656, 1001, 1014, 1341, 1343; 15 U.S.C. §§ 78j(b) and 78ff; as well as Rule 10(b)(5) (17 C.F.R. 240.10-b-5). This turnabout is alleged to constitute an illegal amendment of a grand jury indictment by the Government. *Stirone* v. *United States*, 361 U.S. 212, 215-16 (1960).

In response, the Government argues that there never was an amendment or "variance" from the indictment. We agree. In response to a defense request for a bill of particulars relating to paragraph 35, the Government referred defense counsel to the original counts 2 through 13 of the original indictment which had been dismissed. Paragraph 5(iii) of the original indictment states that the transfers from the Swiss banks to the Sindona corporation "would be treated by the Swiss bank[s] as a *loan* made on behalf of BU or BPF." (Emphasis added). Moreover, at paragraph 8 of that same indictment, the grand jury stated:

> 8. It was further a part of said scheme and artifice to defraud that *SINDONA at all times represented that these moneys were his personally, belonged to companies he owned or to investors. At no time did he reveal that the source of these funds were the general deposits at BU or BPF* or that the funds had been fraudulently and illegally removed from said banks. (Emphasis added.)

A fair reading of these paragraphs would put one on notice that the core of the crime charged was the concealment of the

source of the funds and not the illegality of the fiduciary system employed in Italy. Indeed, an earlier opinion of this court so construed this same paragraph:

> Count 1 alleges active concealment and failure to disclose the fraudulent source of funds for these acquisitions as one of the objects of the broader Sindona-Bordoni conspiracy (¶ 35).

Sindona v. *Grant*, 619 F.2d 167, 171 n.4 (2d Cir. 1980). This court, in a similar context, has held that where the crime charged is one of making false statements to federal regulatory authorities:

> the "core of criminality" is not the substance of the false statements but rather that knowing falsehoods were submitted to the [agency].

United States v. *Bernstein*, 533 F.2d 775 (2d Cir.), cert. denied, 429 U.S. 998 (1976). Thus, the Government was not required to specifically denominate the substance of what was concealed. The very concealment of the fact that the funds were not Sindona's, personally, constitutes the "core of criminality." If the SEC had been notified that the funds used to acquire Franklin and Talcott were obtained by means of a fiduciary contract, whether legal or illegal, it would have at least caused further inquiry into the matter. This is the "evil" of the concealment. For the foregoing reasons, we are compelled to find that there was, in fact, no variance between the pleadings and the proof.

In any event, even if this court were to find that there was a variance, we must still affirm the appellant's conviction. Un-

der Fed.R.Crim.P. 52(a), any "variance which does not affect substantial rights should be disregarded." In *United States* v. *Berger*, 295 U.S. 78, 82 (1935), the Supreme Court enunciated the two prong test to determine whether substantial rights had been affected. First, the accused must be definitely informed of the charges against him so that he might be able to present a defense without surprise by the evidence at trial. Second, substantial rights would be affected by a variance which would render the defendant susceptible to another prosecution for the same offense. Because we find that Sindona cannot meet either part of this test, we hold that even if there was a variance in this matter, there was no prejudice to Sindona.

Sindona has attempted, on this appeal, to establish that he was surprised by the "shift" of the Government late in the trial. Indeed, as Sindona points out, the judge below was at one point confused by the Government's argument that it need not prove the illegality of the fiduciary contracts in Italy. Upon argument by counsel below, however, the judge quickly realized that the Government's argument was correct. This apparent confusion, after many weeks of testimony, might well have been the result of defense counsel's continuous references to "embezzlement" and fraudulent loans, and not the Government's shift of position. As early as July, 1979 during discovery, the Government responded to an inquiry by the judge below that it need not prove a violation of Italian law. Thus, it appears that the defense was aware that the Government never intended to prove an Italian crime.

Appellant relies on *Stirone* v. *United States*, 361 U.S. 212 (1960) for a broad prohibition of any variance between pleading and proof. In *Stirone* the defendant had been indicted for and convicted of interference with interstate commerce by extortion. The only interstate commerce referred to in the indictment was the importation of sand into Pennsylvania to be used in building a steel plant there. The judge, however, in-

structed the jury that it could convict the defendant for interference with the importation of sand *or* the exportation of steel from the completed steel mill. The Supreme Court reversed, reasoning that the defendant had been tried on charges in addition to those returned by the grand jury. There was no indication that the grand jury would have considered interference with the exportation of steel from a still to be completed steel mill a sufficient jurisdictional predicate. This court, has consistently construed *Stirone* narrowly. See, e.g., *United States* v. *DiFrancesco*, 604 F.2d 769 (2d Cir. 1979), rev'd on other grounds, 49 U.S.L.W. 203 (Dec. 9, 1980); *United States* v. *Knuckles*, 581 F.2d 305 (2d Cir.), cert. denied, 439 U.S. 986 (1978); *United States* v. *Brozyna*, 571 F.2d 742 (2d Cir. 1978). In *Knuckles*, *supra*, the defendant had been charged with the crime of distribution of heroin in violation of 21 U.S.C. § 841. At trial, the defense put in evidence that in fact the substance was cocaine. The trial judge, however, charged the jury that it could convict the defendant for distribution of heroin or cocaine. This court affirmed the defendant's conviction, finding no substantial prejudice in the variance between the indictment and the proof. We stated that whereas in *Stirone*, *supra*, there was a complex set of facts, in *Knuckles*, there was only a single set of facts — "the time, place, people, and object proved at trial are in all respects those alleged in Count Two of the indictment." *United States* v. *Knuckles*, *supra*, 581 F.2d at 311. Accord, *Jackson* v. *United States*, 359 F.2d 260 (D.C. Cir.), cert. denied, 385 U.S. 877 (1966). So also, in the present case, whether or not the fiduciary contracts in Italy were "fraudulent and illegal," or legitimate loans, the time, place and object were the same — concealment of the source of the funds from the SEC. Thus, the variance, if any, could not have prejudiced the defendant in making his defense to Count I. Furthermore, it does not appear, nor does Sindona assert, that the Government could prosecute him again for this same

offense. Thus, the second prong of the *Berger* test, *supra*, has also been complied with. We conclude therefore that the variance, if any, was not so substantial as to warrant a reversal.[5]

Sindona further argues that even if there was no variance the Government failed to prove an independent agreement to conceal the Italian crimes, relying upon a trilogy of cases. *Grunewald* v. *United States*, 353 U.S. 391 (1957); *Lutwak* v. *United States*, 344 U.S. 604 (1953); *Krulewitch* v. *United States*, 336 U.S. 440 (1949). The teaching of these cases is, clearly, that:

> after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment.

Grunewald v. *United States*, *supra*, 353 U.S. at 401. However,

> a vital distinction must be made between acts of concealment done in furtherance of the main criminal objec-

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[5] The Government has also argued that since Sindona was convicted on 64 of 65 substantive counts which were directly related to the other nine objects of the conspiracy charged in Count One, the jury unequivocally found Sindona guilty of these remaining objects. Thus, where one object of a conspiracy is successfully challenged on appeal but where the record indicates that the jury convicted the defendant on the remaining objects, this court will not upset the conviction. See, *e.g.*, *United States* v. *Anzalone*, No. 79-1424, slip op. 8869 (2d Cir. June 26, 1980); *United States* v. *Dixon*, 536 F.2d 1388 (2d Cir. 1976); *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), cert. denied, 421 U.S. 950 (1975). Because we find no variance between the indictment and proof or in any event an insubstantial one, we need not address this argument.

> tives of the conspiracy, and acts of concealment done after the central objectives have been obtained, for the purpose only of covering up after the crime.

Id. at 405. See also *Ingram* v. *United States*, 360 U.S. 672 (1959). This court, in *United States* v. *Colasurdo*, 453 F.2d 585 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972) has held, on facts similar to the present case, that concealment from the SEC of the use of assets of one corporation to take over a second corporation was a means of furthering the main objective of the conspiracy — the take-over of the corporation. Thus *Grunewald* did not apply. So here, the main object of the conspiracy charged was not to obtain money from the Italian banks. Rather, the conspiracy was not complete at least until Sindona had acquired the stock of Franklin and Talcott. Thus, concealment from the SEC of the source of the funds used to acquire the stock was imperative — and in furtherance of the conspiracy. As such, no independent proof of an agreement to conceal was required.

The Government fully and convincingly demonstrated that secret loans to Sindona shells had been engineered, that these funds provided the means to purchase Talcott and Franklin and that the source of these funds was concealed from the SEC through the misrepresentations of Sindona. This was the conspiracy alleged in paragraph 35 and there was no necessity to establish that Sindona had committed the crime of embezzlement in Italy. As we have pointed out under *Grunewald* no independent proof of a separate conspiracy to conceal the source from American authorities was required. It was part and parcel of the conspiracy charged in paragraph 35. We therefore reject the appellant's first alleged error.

II. *The Interbanca Repayment.*

In October, 1972, BU ran short of money. Sindona and Bordoni were alleged to have arranged a system whereby Franklin would accept deposits totalling $15 million in Italy which were placed by Franklin at Interbanca as a time deposit. These funds were then released to Amincor pursuant to an oral fiduciary contract similar to the one used to obtain the acquisition money, *supra*, whereby Interbanca would not be liable for repayment to Franklin unless and until these sums were repaid to it by Amincor. This transfer was expedited by the payment of $105,000 to a secret account of the general manager of Interbanca, Gino Uglietti. In turn, Amincor gave the funds to BU under a second fiduciary contract. The records of Franklin indicated only a $15 million time deposit at Interbanca. The Government charged that this conduct constituted wire fraud (Counts 2-7) as well as misapplication of bank funds (Count 8). In addition, these acts were alleged to be the second and fourth objects of the conspiracy (Count 1 ¶¶ 36, 38) as well as the means and overt acts (Count 1 ¶¶ 49, 50, and 35(h)-(n)). In defense, Sindona intended to introduce evidence which would show that in 1975 Interbanca paid $13 million as settlement of civil suits brought against it by the Federal Deposit Insurance Corp. (FDIC) and Sindona on behalf of Franklin.[6] The trial judge, over Government objection, initially permitted the defense to promise such proof in its opening statement to the jury. Later the court changed its position and precluded the proof as irrelevant to any jury in the case. However, Judge Griesa did permit the Government to show that in October 1974, when payment was originally

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[6] The $13 million dollar figure was later shown to consist of $10 million of the $15 million principal plus $3 million in interest plus 50% of any excess sums recovered by Interbanca.

demanded, Interbanca refused, relying on the oral fiduciary contract. This series of rulings is attacked by Sindona in his second claim of error.

At the outset, we note that a judge's ruling on relevance and admissibility under Fed.R.Evid. 403 is a discretionary one. *Hamling* v. *United States*, 418 U.S. 87 (1974); *United States* v. *Aulet*, 618 F.2d 182 (2d Cir. 1980). Thus, the ruling will be reversed only if an abuse of discretion can be shown. *United States* v. *Aulet, supra*. Under Rule 403, a judge may exclude relevant evidence if he finds that "its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time . . . ." In the present case, it is not at all clear that the repayment by Interbanca is even relevant. Under Fed.R.Evid. 401, relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The only probative value associated with the repayment by Interbanca would either be to show that Franklin suffered no loss or that in 1972 Sindona did not intend to misapply Franklin's funds. In *United States* v. *Fortunato*, 402 F.2d 79 (2d Cir. 1968), cert. denied, 394 U.S. 933 (1969) we held that under 18 U.S.C. § 1343, loss to the victim need not be shown in order to prove a violation. Thus, an absence of loss to Franklin is irrelevant. The repayment by Interbanca as evidence of Sindona's 1972 intent is similarly irrelevant. "The offense occurred and was complete when the misapplication took place. What might have later happened as to repayment is not material and could not be a defense. The immediate intent to misapply and defraud was established by the evidence." *United States* v. *Acree*, 466 F.2d 1114, 1118 (10th Cir. 1972). "A wrongful misapplication of funds even if made in the hope or belief that the bank's welfare would ultimately be promoted

is none the less a violation of the statute, if the necessary effect is or may be to injure or defraud the bank. Such is the well settled rule." (citing cases.) *Mulloney* v. *United States*, 79 F.2d 566, 584 (1st Cir. 1935). This court, in *United States* v. *Chiarella*, 588 F.2d 1358, 1371 (2d Cir. 1978), rev'd on other grounds, 445 U.S. 222 (1980), found it difficult to understand how agreeing to an SEC restitution decree would indicate the defendant's state of mind years earlier.

So also, Sindona's suit to compel repayment after the FDIC had brought suit against him and during an SEC and grand jury investigation into the Franklin collapse in 1974, sheds little light on his state of mind in 1972. The trial court received testimony from the counsel for the FDIC in the suit against Interbanca. Mr. Pierpoint testified that a special statute of frauds was available to the FDIC.[7] Thus, Interbanca was destined to lose as between the FDIC and Interbanca and, therefore, Interbanca settled. It was questionable whether this defense would be available in Sindona's suit against Interbanca. In any event, it became quite obvious that if evidence of the repayment was admitted, the Government would attempt to put in proof of the oral fiduciary contract as well as the reasons for the repayment, all of which would entail delay and confusion. Thus, it appears that these risks outweighed the scant probative value of this evidence, which in any event is doubtful at best.

Furthermore, it does not appear that the judge's second ruling prejudiced the defendant. *Miller* v. *Poretsky*, 595 F.2d 780, 784 (D.C. Cir. 1978). In *Miller*, the trial judge specifically ruled before trial that a certain line of proof would be ad-

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[7] Under 12 U.S.C. § 1823(e), the FDIC, as liquidator, was protected from enforcement of any agreement "which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it under this section . . . unless such agreement (1) shall be in writing . . . ."

missible, but later precluded its admission. The Court of Appeals held that this was error because "representations made at [a pretrial conference] should only be reneged upon with great reluctance, usually only to prevent manifest injustice . . . ." *Id.* at 784. In *Miller*, the trial judge had heard an offer of proof. In the present case, the judge was only informed that the defense intended to show repayment of $13 million, not that the actual figures were $10 million plus $3 million in accrued interest and fifty percent of any excess sums received by Interbanca. Moreover, the trial judge indicated that his first ruling was simply on the question of whether the defense could mention the repayment in its opening, but that detailed objections would be heard later on.[8] Thus, the defense was clearly on notice that it might be precluded later during the trial from introducing evidence on repayment.

Sindona further argues that because the judge permitted the Government to show Interbanca's refusal to pay when repayment was originally demanded from Interbanca in October 1974, the defense should also have been permitted to show the eventual repayment. This argument is without merit. When Interbanca originally refused to pay, it relied upon the

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[8] The judge stated that:

> I cannot preclude the defense *at this stage* in the trial from arguing that the original intent was proper as evidenced by the subsequent events. (Emphasis added.)

He repeated,

> The objection is overruled *at this point*. I will of course, hear detailed objections later on. (Emphasis added.)

Later, in ruling on a related point, the judge said

> I have no desire to restrict your opening, and, look, I am not going over every point that the attorneys make to see whether they will be able to introduce evidence on it later on.

oral fiduciary contract. Such evidence was highly relevant to the charge of misapplication of bank funds which were recorded on Franklin's books as time deposit at Interbanca. Moreover, the trial court's refusal to give the instructions requested by the defense, which would have effectively put the repayment into evidence, was proper because the instructions went beyond the evidence in the case. See, e.g., *United States* v. *Gallagher*, 576 F.2d 1028, 1043 (3d Cir. 1978). Thus, unlike *Miller* v. *Poretsky*, *supra*, we are unable to find prejudice sufficient to warrant reversal on this issue. We conclude that the evidentiary rulings attacked on appeal do not constitute reversible error.

III. *Jurisdiction Over Counts 10 and 11*[9]

Counts 10 and 11 charged Sindona with wire fraud in connection with illegal payments to Peter R. Shaddick[10] who was formerly Executive Vice President of the Bank of Montreal. Sindona wanted Shaddick to take a position on the board of directors at Franklin and was willing to give him carte blanche to expand Franklin's foreign exchange trading department.

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[9] Counts 10 and 11 charge Sindona with violation of 18 U.S.C. § 1343 which states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than one thousand dollars or imprisoned not more than five years, or both.

[10] Shaddick was indicted along with Bordoni and other officers of Franklin and pleaded guilty in December 1975. He testified for the Government in this case as well as in *United States* v. *Gleason*, *supra*, n.2. After his testimony in this case, he was sentenced to 3 years imprisonment and fined $20,000.

The Government showed that Sindona secretly deposited $100,000 in a "Mr. New" account at Amincor for Shaddick's account. The $100,000 was characterized as an "interest free" loan. Shaddick eventually repaid the $100,000 without interest. In addition, Shaddick was permitted to speculate in foreign currency for his own account with a guarantee against loss from Sindona. Shaddick's tradings resulted in a $476,000 personal profit. Bordoni deposited $471,000 of this amount in the "Mr. New" account and delivered the remaining $5,000 to Shaddick in New York. In 1974, Shaddick wired to Amincor to transfer the sum of $400,000 to his personal accounts at the Bank of Montreal. These transfers by wire were alleged to be the jurisdictional predicate underlying counts 10 and 11. Sindona claims that the crime, if any, was complete upon the deposits in the "Mr. New" account and therefore there was no jurisdiction over the crimes charges in these counts.

A scheme to defraud is not complete until the proceeds have been received and use of the mail or wires to obtain the proceeds satisfies the jurisdictional element. *Pereira* v. *United States*, 347 U.S. 1, 7-9 (1954). Appellant's reliance upon cases such as *United States* v. *Maze*, 414 U.S. 395 (1974) is misplaced. In those cases, the use of the mails or wires was by an innocent third party of no consequence to the defendant's scheme; the crime had been completed. In the present case, there was sufficient evidence for the jury to find that Sindona effectively controlled the Amincor bank in Switzerland. Thus, until Shaddick arranged to transfer the funds to his accounts at the Bank of Montreal the crime was not complete and, therefore, these latter wires were sufficient for jurisdictional purposes. See *United States* v. *Toliver*, 541 F.2d 958, 966-67 (2d Cir. 1976); *United States* v. *Isaacs*, 493 F.2d 1124, 1151-52 (7th Cir.), cert. denied *sub. nom. Kerner* v. *United States*, 417 U.S. 976 (1974).

IV. *The Evidentiary Rulings.*

During the investigations leading to the present prosecution, the Government, through Requests for International Judicial Assistance, obtained statements from three potential witnesses, Gino Uglietti, Luigi Mazzilli and Giorgio Binda, Italian citizens, who were employees of Interbanca at the time of the $15 million transaction described above. In April, 1979, a Government attorney received assurances from the three that they would voluntarily come to the United States to testify in this prosecution. In the fall of 1979 the Government inquired, through Italian authorities, whether a fourth witness, Giorgio Scianca would voluntarily come to the United States. The Italian authorities reported that he would do so. On January 10, 1980, the eve of trial, the Government learned that Mazzilli and Scianca were refusing to attend the trial. In addition, Binda and Uglietti, although still professing a willingness to come, had not at that point procured the necessary travel documents. Therefore, on January 11, 1980 the Government made, and the court granted, a motion pursuant to Fed.R.Crim.P. 15 to depose the four witnesses in Milan, Italy which was done on January 23 and 24 of that same year.[11] At the depositions, Mazzilli and Scianca reasserted their unwillingness to testify in the United States. Moreover, Scianca stated that he had not been contacted by the Italian authorities until January 8, 1980. Binda and Uglietti stated that they were still willing to come to the trial to testify. On February 14, 1980, however, the Government attorney orally

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[11] The lower court originally ordered that the depositions would be conducted simultaneously with the trial. A petition for a writ of mandamus was made to this court. After oral argument, but before a decision on the petition, the parties agreed upon a delay which would allow the defense lead counsel to attend the depositions. This agreement was approved by the lower court and the mandamus petition was withdrawn.

reported to the court that he had been informed by a United States Consulate employee in Italy that the four witnesses were refusing to travel to this country. The judge thereupon permitted the government to introduce the depositions into evidence, over defense objections. Sindona attacks these rulings.

A second ruling which is challenged on appeal was occasioned when the Government counsel inadvertently received a letter from the offices of the defense attorney in this action describing material to be used in the cross-examination of Carlo Bordoni, the Government's star witness. The material had been prepared by Bordoni, at the request of his Venezualan attorney, as an aid in his representation of Bordoni in extradition proceedings brought by the United States to return Bordoni to answer an indictment against him in this case. In this material, Bordoni was alleged to have made several statements inconsistent with his position on the stand at Sindona's trial. Upon objection by Bordoni's present attorney and after an *in camera* review of the material the judge ruled that it was protected by the attorney-client privilege which was never waived by Bordoni. Thus, he precluded the defense from using it on cross-examination.

1. *Depositions.*

Fed.R.Crim.P. 15(a) provides that in exceptional circumstances, and if it is in the interest of justice, the testimony of a prospective witness may be taken by deposition and preserved for use at trial. A ruling by a trial judge on a motion pursuant to Rule 15(a) will not be reversed absent a clear abuse of discretion. *United States* v. *Wilson*, 601 F.2d 95, 97 (3d Cir. 1979); *United States* v. *Whiting*, 308 F.2d 537, 541 (2d Cir. 1962), cert. denied, 372 U.S. 919 (1963). In the present case,

it appears that the Government presented the district court with sufficiently exceptional circumstances. The judge, in our view, acted well within his discretion. None of the four witnesses were subject to subpoena. Moreover, as the Government had informed the court in its motion, two of the prospective witnesses had specifically refused to come to the United States as of January 11. In addition the remaining two witnesses, Binda and Uglietti, had not yet obtained the necessary travel documents on that date. Thus, there was ample reason to fear that all four witnesses would fail to appear at the trial. Sindona, however, attempts to avoid this inescapable conclusion by asserting that the Government had misrepresented the situation in its motion papers, and therefore, the judge was deceived into granting the motion. We do not accept this argument. The judge below had been informed that at least two witnesses had refused to come to this country. Thus, the fact that Binda and Uglietti testified at the deposition that they were still willing to come does not render the Government's statements misleading. The Government's secrecy as to the exact identity of the willing witnesses seems justified in light of the fact that Uglietti had professed concern over the murder of Giorgio Ambrosoli, a potential government witness. In addition, Scianca's revelation that he had not been contacted by the Italian authorities until January 8, 1980 does not render the Government's statement untrue. Whether or not Scianca was correct, it appears that the Government, in good faith, relied upon the Italian authorities' representations that they had contacted Scianca earlier. The Government, therefore, was justified in so informing the trial judge. Finally, the fact that Mazzilli might have been deposed in Luxembourg rather than in Italy does not support a finding of misrepresentation by the Government. Indeed, the defense never indicated that Sindona wished to attend the depositions, nor was there any motion to change the place of deposition,

Fed.R.Crim.P. 15(b). Thus, there was no reason to investigate the residence of Mazzilli. Having found that the Government did not misrepresent the factual situation to the trial judge, and that there were exceptional circumstances, we find that the judge did not abuse his discretion in granting the Government's motion to take depositions.

Furthermore, we find that the Government had made good faith efforts to obtain the witnesses' presence at the trial. Thus, having failed in this effort, the Government was entitled to introduce the depositions of the witnesses into evidence. *Ohio* v. *Roberts*, 100 S.Ct. 1531 (1980). The prosecution in *Roberts* had been in contact with the witness for four months and had attempted to subpoena her. In the present case, the prosecution had been in contact with three of the witnesses for almost one year and with the fourth for four to six months. These witnesses were not subject to subpoena. Moreover, the Government had promised to pay all expenses of the witnesses. Thus, when the prosecutors were informed by a consular employee that these witnesses were refusing to come to the United States, the Government had done all that it could. The witnesses were "unavailable" for purposes of Fed.R.Evid. 304(a)(5), as well as Fed.R.Evid. 15(e). *United States* v. *Seijo*, 595 F.2d 116 (2d Cir. 1979). Moreover, the constitutional standard of good faith efforts, for purposes of the Sixth Amendment confrontation clause has also been met. *Ohio* v. *Roberts*, *supra*. Although it would have been preferable to present the court with affidavits, the fact that the trial counsel for the Government presented the factual situation orally is not fatal. It is proper for the court to accept, in its discretion, the representations of counsel with respect to the unavailability of a witness. *Bailey* v. *Southern Pacific Transp. Co.*, 613 F.2d 1385 (5th Cir. 1980). In addition, there is no reason, on these facts, to assume that the Government lied. We therefore find that the trial judge properly admitted the depositions into evidence.

2. *The Attorney-Client Privilege.*

We must also affirm the lower court's ruling precluding the cross-examination of Bordoni based upon material obtained from Bordoni's Venezuelan attorney. Although this court has permitted an attorney to respond to an attack by a client by releasing confidential matters to defend himself, see, e.g., *Meyerhofer* v. *Empire Fire and Marine Insurance Co.*, 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998 (1974), this case does not present such a situation. Although Bordoni may have previously implicated Martinez in certain statements he has made, a review of the material which the defense proposed to use in the present case does not reveal anything which defends Martinez or clears his name. Thus, reliance upon *Meyerhofer, supra*, is misplaced.

Sindona's second argument, based upon an analogy to the exclusionary rule applied to evidence seized in violation of the fourth or fifth amendments as likewise inapt. The exclusionary rule is utilized to deter official misconduct. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Thus, evidence seized by private parties and then turned over to the police is not barred because to do so would not deter official misconduct. The attorney-client privilege, on the other hand, is granted in order to foster full and open communication between the attorney and his client. 8 Wigmore on Evidence § 2291 (McNaughton ed. 1961). If information obtained as a result of a violation of that privilege were permitted to be used against the client on cross-examination, it would destroy the attorney-client privilege. A client could hardly confide in counsel if this result were sanctioned. Exclusion of evidence obtained in breach of that confidence, as in this case, is proper. In any event, it appears that the defense did manage to cross-examine Bordoni on most of the areas covered in the privileged memorandum. The exclusion of this evidence, therefore did not significantly affect the

cross-examination of Bordoni, and indeed, much of it could have been excluded as cumulative. *United States* v. *James*, 609 F.2d 36 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980).

We hold, therefore, that the trial judge properly excluded this information.

V. *Summation.*

Sindona's final contention is that the Government, in its rebuttal summation, (1) impermissibly commented upon the defendant's refusal to take the stand, (2) referred to matters not in evidence, and (3) impermissibly attempted to bolster Bordoni's credibility by vouching for him. The challenged statements are set out in the margin.[12] In addition, Sindona

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[12] The challenged statements allegedly referring to the defendant's refusal to testify were in reference to the documentary evidence showing repayment of the $67,000,000 used to purchase Franklin and Talcott. In rebuttal, the Government attorney stated:

> Now, in response, Sindona does not come in here and call a lot of witnesses and introduce a lot of documents as you might expect, saying, "Listen, I had $40 million, and I invested it in this bank, and I lost my money."
>
> Well, he makes the argument but where are the witnesses, where are the documents?
>
> Can you have $40 million and not have anybody know where it is and where it came from? No accounts, no collateral?
>
> You can't, and the reason is because Bordoni was telling you the exact truth, and it is unbutted [*sic*], and it stands here telling you exactly what happened in this case, and there are no documents and no witnesses in the case that disagree with it.
>
> And what he is telling you is that Sindona did not have this money, and that he had developed a scheme to use the general funds of these banks for his own purposes, and he would record them as deposits at other banks.
>
> That could go on just as long as his bank could get deposits and just as long as he was able to repay or close these transactions, or pay the interest on these transactions as they became due.

claims that the instructions given by the judge below inadequately cured the statements made by the Government and in

---

> I am going to come to that now.
>
> What does Sindona do? Well, he still does not call anybody to explain these things, but he comes in with a lot of documents and he says, "These documents show that the money removed from the Italian banks was in fact repaid."
>
> Well, as Mr. Mack said in his summation, it doesn't make a whit of difference if these sums were repaid.

The statements which Sindona argues refer to evidence not in the record related once again to this repayment. The Government in rebuttal introduced documents to show that the money used to repay the "loan" was at least in part obtained pursuant to yet another fiduciary contract. Government counsel stated in rebuttal summation:

> It is repaid but you have another fiduciary contract of $20 million to Orana Investment, whatever that is, and there is probably canana and oanana, an endless number of companies.
>
> This scheme goes on and on.
>
> What we have done is include a series of documents, 177 and 195 to show you how it works and Mr. Mack mentioned in his summation a number of documents showing you the $5 million, where the interest on the $5 million came from.
>
> We have not and we will not in this case call witnesses to explain this whole hug [*sic*] manipulation that is going on in Italy. What is important to this case is that these funds were removed from the general funds of the Italian banks and that the Italian banks did not reflect where that money went and there was a very good reason why they could not. It could not loan nearly that amount of money to the man who owned the bank.
>
> Getting the money off to Fasco International S.A. Mr. Sindona presented himself in New York, acquired the Franklin stock and there was a conspiracy to conceal and withhold the source of those funds from the federal regulatory authorities who were interested in that.
>
> That is our case. If there is a case in Italy and somebody wants to pursue it, that is fine. But it is not in this courtroom.

Finally, in response to an attack upon the credibility of Bordoni in the defense summation, Government counsel stated:

> In viewing their testimony [defense counsel] is correct that Bordoni and Shaddick have a motive to lie, but you must also consider it's not Bordoni and Shaddick who are trying this case. *It's not Bordoni who sits behind the United States Attorney's desk and prepares the case that's presented to you.* (Emphasis added.)

fact aggravated the error by giving a liberal uncalled witness instruction. This instructions are also set out in the margin.[13]

The statements by the prosecution concerning Sindona's failure to rebut the overwhelming case against him, when viewed in the context of the entire summation, as we must, *United States* v. *Williams*, 583 F.2d 1194 (2d Cir. 1978), cert. denied, 439 U.S. 1117 (1979), and in light of the curative instruction given by the judge, do not warrant a reversal. It is settled law that the government may comment upon the de-

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[13] The trial judge, in an attempt to cure any impropriety of the Government's references to "I" when speaking of Sindona's defense instructed the jury:

> Of course the government attorney did not suggest and could not suggest that you draw any inferences from the fact that the defendant himself did not testify. The argument at that point was directed solely to the suggestion that you might draw inferences from the fact that certain witnesses, witnesses entirely apart from the defendant, were not called.

The judge then went on to inform the jury that:

> I instruct you that the matter of drawing inferences from the absence of certain witnesses is a matter which must be dealt with strictly within the framework of logic and reason in the same way as the drawing of inferences in any other regard in this case. It is not a matter of mere speculation or curiosity.
>
> Before you can draw an inference against a party from the fact that any witnesses or types of witnesses were not called, there must be a logical and reasonable basis for drawing such inference; that is, there must be a positive reason for you to believe that such witnesses or types of witnesses were available to the party and that it would have been natural to expect that party to call the witnesses if their testimony would have been favorable.
>
> If you cannot go through this chain of reasoning, you should not draw any inferences from the absence of certain witnesses, and as I have indicated, you are duty bound not to even consider this matter in respect to the defendant himself.
>
> It follows from what I have said that it is entirely within your province to draw no inferences at all from the failure to any party to call certain witnesses or types of witnesses.

fendant's failure to call witnesses. *United States* v. *Barnes*, 604 F.2d 121, 148 (2d Cir. 1979), cert. denied, 100 S.Ct. 1833 (1980); *United States* v. *Bubar*, 567 F.2d 191, 199 (2d Cir.), cert. denied, 434 U.S. 872 (1977). Thus,

> [a] constitutional violation occurs only if either the defendant alone has the information to contradict the government evidence referred to, or the jury "naturally and necessarily" would interpret the summation as a comment on the failure of the accused to testify.

United States v. *Bubar*, *supra*, 567 F.2d at 199. See also, *United States* v. *Alessi*, No. 80-1057, slip. op. 6369, 6402 (2d Cir. November 6, 1980). Applying this standard in *United States* v. *Barnes*, *supra*, this court considered a challenge by the prosecution to the defendant to explain large amounts of unreported income. This court reasoned that "[n]o jury could possibly think that no independent witness to the receipt of income existed." *United States* v. *Barnes*, *supra*, 604 F.2d at 148. So also, in the present case, no jury could reasonably conclude that Sindona was the only witness to the execution and implementation of these fiduciary contracts. The only challengeable references to the defendant in this case, therefore, would be the use of the word "I" three times when referring to Sindona. The judge below, however, stated that based upon a cold record these references seemed more damaging than when he listened to them. In light of *United States* v. *Williams*, *supra*, where we held that the trial judge is in the best position to observe the effect of statements upon the jury, it would appear that these references to Sindona were not prejudicial statements upon the defendant's decision not to testify. In any event, Judge Griesa instructed the jury to disregard these statements. This instruction which is set out *supra*,

is sufficiently similar to the one approved by this court in *United States* v. *Bubar, supra*, 567 F.2d at 200 n.10. Thus, any possible damage inflicted by these statements was cured by the instruction. For these same reasons, we find the appellant's challenge to the propriety of this instruction to be without merit.

We similarly find that the statement, in rebuttal, by the prosecution that Bordoni was not trying this case was not improper. In the defense summation, counsel for the defendant intimated that the prosecutors were the pawns of Bordoni. When the integrity of the prosecution is so attacked, we have upheld a retort similar to the one here. See *United States* v. *Praetorius*, 622 F.2d 1054 (2d Cir. 1979). We, therefore, do not find that this statement deprived the defendant of a fair trial.

In addition, we find that the appellant's remaining arguments on this issue are without merit. The Government did not refer to matters not in the record. The challenged remarks were in rebuttal to the defense that Sindona had repaid the $67 million dollars used to purchase Franklin and Talcott. The Government had introduced evidence which would show that these repayments were further fiduciary contracts, and, therefore, the entire transaction was a "wash." In referring to this evidence, while the prosecutor might have been somewhat carried away by a "forensic zeal," see *United States* v. *DeAlesandro*, 361 F.2d 694, 697 (2d Cir.), cert. denied, 385 U.S. 842 (1966), the appellant was not prejudiced. See *United States* v. *Alessi, supra*, slip op. at 6400. We also find that the trial court's missing witness instruction was in accord with the settled law in this circuit. See, e.g., *United States* v. *Erb*, 543 F.2d 438, 445 (2d Cir.), cert. denied, 429 U.S. 981 (1976).

Appellant's contentions that Sindona was unfairly tried and improperly convicted have not been sustained by the record or the arguments made. We conclude that he was properly convicted after a fair trial and his conviction is affirmed.

Excerpt from Proceedings — Oral Ruling of the United States District Court for the Southern District of New York on Carlo Bordoni's Claim of Attorney-Client Privilege.

UNITED STATES OF AMERICA	)	
	)	
v.	)	75 Cr. 945
	)	
MICHELE SINDONA.	)	February 13, 1980

. . . . . .

The Court: The objection is sustained.

I direct that no use be made of Exhibits G-1 or G-2 or H-1 or H-2 in any fashion by way of introduction in evidence, reading at the trial, reference in questions, basis for questions.

The reason for the ruling is that the record shows that these documents were given by Mr. Bordoni to his attorneys in Venezuela in connection with their representation of him in the extradition proceedings brought against him in Venezuela.

There is no indication that he has ever waived the right of confidentiality which attached to these documents.

He has testified that the documents were given by him to his attorneys at their request for use by them in preparing to represent him in the extradition proceeding.

These are not public documents, there is no evidence that they were public documents, there is no evidence that they became part of any court documents.

If there were court documents that embodied some or all of the information contained therein, those documents could be produced. Those are not such documents.

Now, these documents were obtained by the Proskauer firm from a former attorney for Mr. Bordoni by the name of Marti-

nez. Mr. Martinez was one of several lawyers working for Mr. Bordoni in connection with his extradition; at some point, apparently December of 1976, Mr. Martinez was terminated as far as his representation of Mr. Bordoni.

A dispute arose between Bordoni and Martinez. The only evidence we have about that dispute is the testimony of Mr. Bordoni here, and he says that he was concerned and believed that Martinez was stealing from him.

Mr. Bordoni has brought criminal charges in Venezuela against Martinez which, as far as the record now shows, are still pending.

There is an argument made by the defense here that somehow Mr. Martinez had the right to give these documents to the Proskauer firm because Mr. Martinez had been subject to a criminal proceeding in Venezuela.

I reject such an argument.

There are further arguments, which I think I have already dealt with, but I'll deal with them briefly now.

There is an argument that regardless of whether a Venezuelan attorney breached the attorney-client privilege in giving these documents to the Proskauer firm, the Proskauer firm could nevertheless use these documents.

I also reject that argument, and I think I have stated that position already.

But under the cases in our country — and there is no satisfactory evidence in the case law in Venezuela which would be to the contrary, even if Venezuelan law applied on the point — Mr. Bordoni has the right to claim his privilege against use of these documents such as the Proskauer firm intends to make of them.

He was the only one who could waive the privilege, he has never waived it, he has a right to insist upon it.

It is not completely clear exactly which of the several lawyers Mr. Bordoni physically gave these documents to, it is not

clear exactly how Mr. Martinez came into possession of them, whether it was directly from Mr. Bordoni or from some other lawyer, but the fact is, according to the evidence on the record, that Mr. Bordoni gave these materials to his attorneys in confidence; he gave them to — he gave the documents to some one or more of his attorneys, and they were bound under the privilege.

Either Martinez got the documents, or the document, directly from Bordoni, or he got them from another of Bordoni's attorneys.

In any event, the documents were privileged. Bordoni never waived the privilege, and Martinez' possession of these documents was covered by the attorney-client privilege, and they were still covered by the privilege when they were handed over to the Proskauer firm.

Just to anticipate a point which I believe will come up, which was discussed yesterday, it has been argued several times by Mr. Frankel that he has a right to cross-examine Mr. Bordoni about Mr. Bordoni's claim of privilege, and somehow indicate to the jury through the questioning that Mr. Bordoni has waived his Fifth Amendment privilege but is claiming his attorney-client privilege.

Apparently Mr. Frankel wishes to draw some conclusion from that or have the jury draw some conclusion from that, unfavorable to Mr. Bordoni.

Such questioning will not be permitted.

Mr. Bordoni had a right to waive his Fifth Amendment privilege, he had a right to, nevertheless, maintain his attorney-client privilege. He has not acted inconsistently.

It would be improper to question him about the exercise of a legal right and attempt to draw some unfavorable impression directed to the jury.

Now, is there anything else we need to cover this morning before we bring the jury in?

Mr. Sprizzo: The only thing, your Honor, a small matter. In view of your Honor's ruling, we would request that the particular document your Honor sustained an objection to be returned to us.

The Court: The documents are now returned.

Mr. Kenney: Your Honor —

The Court: They have copies, your Honor. I think they should all be returned.

The Court: All copies should be returned.

Mr. Kenney: If I may, your Honor, we would like to have copies —

Mr. Sprizzo: This can be sealed.

Mr. Kenney: As part of the record, sealed.

. . . . . .

Excerpt from Proceedings — Hearing Before the United States District Court for the Southern District of New York on Carlo Bordoni's Claim of Attorney-Client Privilege.

UNITED STATES OF AMERICA	)	
	)	
v.	)	75 Cr. 945
	)	
MICHELE SINDONA.	)	February 13, 1980

. . . . . .

The Court: I would like to give these back to you, Mr. Sprizzo, and ask you to inquire of Mr. Bordoni, and then Mr. Frankel can cross-examine if he wishes, and Mr. Kenney can ask any questions. That way we will get the evidence out.

CARLO BORDONI, RESUMED: DIRECT EXAMINATION

By Mr. Sprizzo:

Q Mr. Bordoni, do you know a man named Martinez?

A Yes, sir.

Q What is his first name?

A Carlos Martinez Murga.

Q When did you first meet Mr. Martinez?

A Some time in November, I think, 1974.

Q Would you tell the Court the circumstances under which you met Mr. Martinez?

A Well, Mr. Martinez was introduced to me by Mr. DiFalco, who had been in contact with a very well-known gentleman in Venezuela, Pedro DeNocha —

The Court: I'll tell you, Mr. Bordoni, we need to bring this jury in. Let's have a few peripheral details —

Mr. Sprizzo: This is not meant to be peripheral.

The Court: Did you retain him as an attorney?

The Witness: Yes, sir.

The Court: For what purpose — for what legal purposes?

The Witness: To take care of all legal matters concerning myself and my wife as well as the legal matters concerning investments we are going to make in Venezuela, because we didn't know the law.

The Court: All right, next question, Mr. Sprizzo.

Q Did Mr. Martinez represent you in connection with your petition for Venezuelan citizenship?

A Venezuelan what?

Q Venezuelan citizenship.

A Yes.

Q Was he retained as an attorney in that capacity?

A Yes.

Q Did there come a time, Mr. Bordoni, when you were arrested in Venezuela?

A Yes.

Q Did there come a time when extradition charges were brought against you?

A Yes.

Q Did you talk to Mr. Martinez about that?

A Yes.

Q Did you obtain specialists in extradition matters as a result of Mr. Martinez' efforts?

A Yes.

Q And were these lawyers introduced to you through Mr. Martinez?

A I beg your pardon?

Q Were these other lawyers introduced to you through Martinez?

A Yes, sir.

Q Now during the period of time, say, from 1974 through 1978, when you came back to the United States, was Mr. Martinez on a retainer? Did you pay him a fee?

A He was until the end of December of 1976.

Q Was it your understanding that your retainer was limited to the immigration matters?

A No, it was extended to any legal matters including the extradition.

Q And did you consult with Mr. Martinez about the extradition matters?

A Oh, yes.

Q By the way, who were these other lawyers you retained?

A The other lawyers were Jorge Sosa Cachin.

Q Mr. Bordoni, I show you what has been marked as Defendant's Exhibit G-1 for identification, G-2 for identification, H-1 for identification and H-2 for identification.

The Court: Just a second.

Did he give the full list of the other lawyers?

Q Did you give a full list of the other lawyers?

A No, sir.

The Court: Can you give us just the last names, what was the first name — the last name of the first lawyer?

The Witness: The first lawyer was Martinez.

The Court: All right.

Now aside from Martinez.

The Witness: Yes.

The Court: The other last names.

The Witness: Then there was Sosa.

The Court: How do you spell that?

The Witness: Sosa.

The Court: Next?

The Witness: Villacencio.

The Court: All right, next?

The Witness: Arias.

The Court: Next?

The Witness: Castillo.

The Court: Any others?

The Witness: Others come later, after Martinez. When Martinez was — when the contract with Martinez was interrupted.

The Court: All right, and what were the later ones?

The Witness: Excuse me, your Honor?

The Court: The names of the later lawyers.

The Witness: Yes.

Gonzalez.

The Court: Any others later?

The Witness: Yes.

The Court: Who?

The Witness: Montero.

And Linares.

The Court: All right.

The Witness: Guitierrez, Nava Pinate, Vecchionacce.

The Court: All right. I'll tell you what we need are the main ones. We don't need every associate.

Are they the main ones?

The Witness: Yes.

The Court: All right, you go ahead with your questions.

Q Directing your attention to G-1, G-2, H-1 and H-2, Defendant's exhibits, can you tell us what they are?

A They are information I was requested by my lawyers, Martinez, Sosa, Vila Vincencio, Arias, to give them an idea of what my background concerning Franklin National Bank case and also the Italian case was like.

Q Whose writing appears in Spanish on G-1 and H-1?

A That's mine, my handwriting.

The other one is a sort of a —

The Court: A what?

The Witness: A sort of —

The Court: Which one —

Q Will you identify by number so the record is clear?

The Court: Which is the one you have been speaking thus far about?

The Witness: I have been speaking about this one here.

Q H-1 for identification, that is in your handwriting?

A Yes, it is.

Now, I am talking about this one here.

Q Now G-1 for identification, is that your handwriting?

A It is.

In the second one I was expressing my opinion on the counts comprised in the U.S. indictment for the Franklin case.

Q Now, Mr. Bordoni, what was your understanding as to the relationship of Martinez and Arias and Vila Vincencio with respect to the extradition matter; were they working together, as far as you understood it?

A They were working together and I would say under Martinez' supervision.

Q Now, when you gave G-1 and H-1 for identification to your Venezuelan — do you recall which one specifically you gave it to?

A One of those mentioned, I mean, Martinez, Vila Vincencio, Sosa, Arias, Castillo.

Q You don't have a specific recollection as to which one it was?

A No, because sometimes they were coming there one or two of them; at other times they were all around.

Q Was it your intention that these two documents, G-1 and H-1 for identification, would be disclosed in the form in which they now appear?

A No, sir.

Mr. Sprizzo: Your Honor, I don't think I have any further questions.

The Court: Mr. Frankel, do you have cross?

Mr. Frankel: Yes, a little, your Honor.

CROSS-EXAMINATION

By Mr. Frankel:

Q Mr. Bordoni, when did you write those documents?

A I wrote these documents, to the best of my recollection, a few days after I was jailed, I was imprisoned.

Q Do you remember what month that would be?

A I am trying to guess now. Between the end of September 1976 and October, the same year.

Q Mr. Bordoni, what was or is, as nearly as I pronounce it correctly, Inversiones Mafal?

A Inversiones Mafal was a company founded in Caracas, Venezuela.

Q By whom?

A It was founded by Carlos Martinez and participated in the foundation of the company also my lawyer, Mr. DiFalco.

Q And did Mafal stand for something?

A I beg your pardon?

Q Did the word "Mafal" stand for something?

A I am sorry but —

Mr. Sprizzo: Your Honor, I don't want to object but it doesn't seem to be related.

The Court: I am going to allow it.

Mr. Frankel: It is meant to be related. It is part of cross-examination.

The Court: Go ahead.

Q Go ahead.

A I was told, I don't remember when, that Mafal stood for Martinez/Falco.

Q Who told you that?

A I don't remember now, I think the two persons I mentioned.

Q Who paid Martinez' bills, you personally or Inversiones Mafal?

A They were paid — he was paid — he was paid initially, as far as I remember, by Inversiones Mafal.

Q Were you also an employee of Mafal?

A Yes.

Q Did that company, Mafal, own the place in which you lived, the Villa Virginia?

A Yes.

Q Now, you have named a number of members of the Venezuelan bar, Mr. Bordoni. I got up to ten by my count. Were they paid by you?

A They were paid by Inversiones Mafal.

Q All of them?

A I think so.

Q Now, Mr. Bordoni, would you tell us the circumstances of the termination of the end of your relationship with Carlos Martinez?

A Yes.

Q Please.

A The reasons were first — excuse me — allow me to think a moment.

One of the reasons was that he didn't give me an accounting of the investments that had been made.

The other reason was because of Martinez having sent to Mr. DiFalco, around the middle of October, a telex saying more or less that the situation, or better, the credit — the banking credit in favor of Inversiones Mafal was looking bad because of my having been arrested, and he was suggesting to Mr. DiFalco to look for a loan for — of 3 million, I think, bolivars, or the equivalent of about $700,000 to be paid into an account that Martinez personally had, and he gave the number, with Banca Mercantil d'Agricola, Salon Grande, Caracas, Venezuela.

That bank —

The Court: I don't know what we need all this detail for.

The Witness: I am giving the reason, your Honor.

The Court: I know, but I am just suggesting to Mr. Frankel that we get — I don't need all this detail.

Mr. Frankel: Your Honor, I didn't know I was inviting that much.

Q Did you bring criminal accusations against Mr. Martinez?

A Yes, sir.

Q What did you charge him with?

A With having taken money and having placed a mortgage on the house, on our house, without my authorization, and having taken away from one of the two safes I have in my house $360,600 in $100 bills, and — well, that's more or less all.

Q You said that money in $100 bills was in your house —

A Yes, sir.

Q Isn't it a fact, Mr. Bordoni, that the main relationship you had with Mr. Martinez was in your business dealings in Mafal?

A No, sir.

Q What has been the result of the criminal accusations you brought against Mr. Martinez?

A Well, still a —

Q He is still defending against them?

A Yes.

Mr. Franklin: Do you have anything else?

I have nothing further.

Mr. Sprizzo: I have a few questions.

The Court: All right.

REDIRECT EXAMINATION

By Mr. Sprizzo:

Q Mr. Bordoni, this corporation, what is that corporation again, how do you pronounce that?

A Inversiones Mafal C.A.

Q So far as you know, did Inversiones Mafal have any extradition or immigration —

A I beg your pardon?

Q Did the corporation have any immigration or extradition problems?

A The company?

Q Yes, the company.

A No, not as far as I know.

Q Those were the extradition and the immigration, which were your own personal matters, is that correct?

A Yes.

Q And these lawyers, Mr. Martinez and Mr. Arias and Mr. Vila Vincencio were consulted in connection with your immigration and your extradition matters?

A Yes.

Q And that had nothing to do with the corporation.

A No.

Mr. Frankel: One or two further questions, your Honor.

RECROSS-EXAMINATION

By Mr. Frankel:

Q Are you saying that these personal matters on which you consulted these lawyers were paid for by the corporation, that their bills were paid by the corporation?

A Yes, sir.

Q You are sure of that?

A Yes, on the shareholders account, that is, on the account that my wife and I had in the corporation.

Mr. Sprizzo: I have nothing further.

The Court: Mr. Kenney, do you have anything?

Mr. Kenney: Just one or two, your Honor.

By Mr. Kenney:

Q Mr. Bordoni, who put money into the corporation, Inversiones Mafal?

A The money in the corporation was put by — by Carlos Martinez, who was receiving both in the form of telegraphic transfer and in bank notes from, mainly from Switzerland, and in the name of my wife, and Martinez was also — part of this money to credit my wife's personal account we had with — she had with Banco de Commercio, Caracas, and Martinez was authorized to debit by check all the accounts both of the corporation and personal accounts.

By Mr. Sprizzo:

Q Mr. Bordoni, the money that went into Mafal originally was yours and your wife's money, is that right?

A Yes, sir.

Q It wasn't Martinez' money?

A Absolutely not.

Q It wasn't DiFalco's money?

A No.

The Court: May I see the documents?

Are there any other comments before —

Mr. Sprizzo: No, your Honor. Those are the relevant facts.

The Court: Now, I take it that you claim, Mr. Bordoni, you make a claim of privilege as to these documents?

The Witness: Yes, sir.

The Court: Right?

The Witness: Yes, sir.

The Court: And that is the claim, Mr. Sprizzo, and that means you would object to any use of these documents as a basis for questioning or introduction in evidence or otherwise, right?

Mr. Sprizzo: I would.

The Court: Right, Mr. Bordoni?

The Witness: Yes, sir.

. . . . . .

Excerpt from Sentencing Proceedings.

United States District Court
Southern District of New York

UNITED STATES OF AMERICA	)	
	)	
v.	)	S 75 Cr. 948
	)	
CARLO BORDONI,	)	
	)	
Defendant.	)	

Before:

HON. THOMAS P. GRIESA,
District Judge

New York, New York
April 23, 1980
10:15 A.M.

APPEARANCES:

FOR THE GOVERNMENT: JOHN KENNEY,
Assistant U.S. Attorney

FOR THE DEFENDANT: JOHN SPRIZZO, ESQ.,
ANTHONY DIFALCO, ESQ.

. . . . . .

The Court: Does the government have any statement?

Mr. Kenney: We have a short statement we would like to make, your Honor.

As your Honor knows, Mr. Bordoni, after his return from Venezuela in June of 1978, entered into an agreement with the United States. Pursuant to that agreement, he has cooperated, offered information both in the investigative stage and at the trials of United States v. Gleason and other defendants, and United States v. Sindona, the most recent trial.

We see that cooperation as full and complete. He was helpful to the United States both in the investigative and trial stages and, of course, the record of those trials which were observed by the Court speak for themselves.

We think that in the Gleason case, the record would show that Mr. Bordoni's testimony was helpful but in the Sindona case, there is substantial doubt the case could have been brought by the United States without Mr. Bordoni's testimony.

. . . . . .